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CURRENT LEGAL DEVELOPMENTS

The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?

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Abstract
This article offers an analytical overview of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African human rights court, which entered into force in January 2004. The article seeks to answer the questions of whether and, if so, to what extent the Protocol strengthens the African human rights protection system.

Key words
advisory jurisdiction; African Charter on Human and Peoples' Rights; African Commission on Human and Peoples' Rights; African Court on Human and Peoples' Rights; complementarity; contentious jurisdiction

1. Introduction

The date 25 January 2004 was important for Africa, Africans, and all those others advocating human rights protection on this so beautiful but troubled continent. This day marked the entry into force of the Protocol to the African Charter on Human and Peoples' Rights[1] on the Establishment of an African Court on Human and Peoples' Rights.[2] The Court, which still needs to be composed, installed, seated,

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1. The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 – (1982) 21 ILM 58, available at www.achpr.org (hereafter 'Charter'). The Charter was signed in 1981 in Banjul (Gambia), entered into force in 1986 and has been ratified by 53 African states. On the Charter see, e.g., F. Ouguergouz, *The African Charter on Human and Peoples' Rights – A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003); M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights – The System in Practice, 1986–2000* (2001); and V. Nmehielle, *The African Human Rights System – Its Laws, Practice, and Institutions* (2001).

2. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (hereafter 'Protocol', available at www.achpr.org. For comments on (earlier drafts of) the Protocol see, e.g., J. Harrington, 'The African Court on Human and Peoples' Rights', in Evans and Murray, *supra* note 1, at 305; A. O'Shea, 'A Critical Reflection on the Proposed African Court on Human and Peoples' Rights', (2001) 1 *African Human Rights law Journal* 285; N. Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late than Never', (2000) 3 *Yale Human Rights and Development Law Journal* 45; J. Mubaggizi and A. O'Shea, 'An African Court on Human and Peoples' Rights', (1999) 22 *South African Yearbook of International Law* 256; M. Mutua, 'The African Human

and housed, fills a gap in the African human rights system which until recently consisted only of a quasi-judicial organ: the African Commission on Human and Peoples' Rights.[3] The Court complements and reinforces the Commission, which in spite of its increasing significance, so far has only been able to make a modest contribution to the protection of the rights enshrined in the Charter.[4]

There is no doubt that the Protocol has the potential to make the African human rights machinery function more effectively. However, the mere establishment of a court empowered legally to condemn states parties for human rights violations is no guarantee of success. An effective human rights protection mechanism requires more, such as the accessibility of the Court to victims of human rights violations, independent and impartial judges who are willing to give human rights maximum effect, financial resources that enable the Court to fulfil its tasks adequately, and enforceability of judgments. These, indeed, concern some of the asserted weaknesses of the African Commission, and commentators have rightly warned that the Court will have no or only minimal added value if it were to suffer from the same or comparable shortcomings.[5] This article describes the background and process of establishing the Court, analyses the Protocol and seeks to answer the question of whether it provides for a legal framework that will enable the Court to live up to expectations.

2. Background

2.1. The initial absence of a court

The idea of establishing an African human rights court is not new. It dates back as far as 1961, when, at the conference on the 'Rule of Law' organized by the International Commission of Jurists (ICJ) in Lagos, Nigeria, African jurists called upon African governments to adopt a human rights convention for the continent and to create a court that would be accessible to victims of human rights violations.[6] Time, however, appeared not yet ripe for such a convention, let alone a human rights court. In the 1960s and 1970s the decolonization process and the protection of regained independence and freedom completely dominated African politics. African leaders were strongly opposed to external meddling in their internal affairs and

Rights Court: A Two-Legged Stool?', (1999) 21 *Human Rights Quarterly* 342; G. Naldi and K. Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights', (1998) 16 *Netherlands Quarterly of Human Rights* 431; A. Stemmet, 'A Future African Court for Human and Peoples' Rights and Domestic Human Rights Norms', (1998) 21 *South African Yearbook of International Law* 233; and G. Naldi and K. Magliveras, 'The Proposed African Court on Human and Peoples' Rights: Evaluation and Comparison', (1996) 9 *African Journal of International and Comparative Law* 944.

3. On the Commission see E. A. Ankumah, *The African Commission on Human and Peoples' Rights – Practice and Procedures* (1996); Ouguergouz, *supra* note 1, and Nmehielle, *supra* note 1. For a compilation of documents of and relating to the Commission see R. Murray and M. Evans (eds.), *Documents of the African Commission on Human and Peoples' Rights* (2001).
4. See further section 2.2, *infra*.
5. Mutua, *supra* note 2, at 363, and Udombana, *supra* note 2, at 47.
6. International Commission of Jurists, *African Conference on the Rule of Law, Lagos (Nigeria), 3–7 January 1961 – Report on the Proceedings of the Conference* (1961), 9.

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saw international pressure concerning human rights protection as such unwanted interference.[7]

It took 20 years of additional conferences, extensive lobbying, and much international political pressure before Africa's political leaders were willing to accept an African human rights treaty.[8] The 1981 African Charter is a unique document that embodies both universal and typically African norms. It distinguishes itself from other human rights conventions by guaranteeing both civil and political[9] and economic and social[10] rights, recognizing collective rights,[11] and conferring duties upon individuals.[12] In addition, the Charter, unlike the European and American conventions on human rights, did not provide for a court. African states appeared only willing to establish the African Commission, which was given the task of promoting human rights[13] and, in cases of serious human rights violations, of making recommendations to the Assembly of Heads of State and Government of the Organization of African Unity (OAU),[14] recently replaced by the African Union (AU).[15]

According to commentators,[16] the choice to establish a commission and not a court was motivated by typically African norms and values. These would favour negotiation, conciliation, and other amicable forms as the appropriate methods for dispute settlement, and would oppose the confrontational judicial settlement common in the West. The drafters of the Charter have indeed stressed this point,[17] but one doubts whether this was for the political leaders the real, or even a, reason for opposing a court. In Africa the significance of amicable dispute settlement may be stressed more than elsewhere, but African traditions and norms do not, especially

7. G. Naldi, 'Future Trends in Human Rights in Africa: The Increased Role of the OAU?', in Evans and Murray, *supra* note 1, at 2.
8. For an overview of the process leading to the adoption of the Charter see Ouguergouz, *supra* note 1, at 19–48.
9. Charter, *supra* note 1, Arts. 2–14.
10. Ibid., Arts. 15–18.
11. Ibid., Arts. 20–24.
12. Ibid., Arts. 27–29. It includes duties towards the family, society, the state, and the international community. The inclusion of duties in the Charter has been criticized on the ground that it could undermine the enjoyment of individual rights. See, e.g., H. Okoth-Ogendo, 'Human and Peoples' Rights: What Point is Africa Trying to Make?', in R. Cohen et al. (eds.), *Human Rights and Governance in Africa* (1993), 78. The criticism, however, is not shared by all. See, e.g., M. Mutua, 'The African Human Rights System: A Critical Evaluation', (2000) available at http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF, 12.
13. Charter, *supra* note 1, Art. 45. On the promotional activities of the Commission see, e.g., V. Dankwa, 'The Promotional Role of the African Commission on Human and Peoples' Rights', in Evans and Murray, *supra* note 1, at 335.
14. Charter, *supra* note 1, Art. 58.
15. The Constitutive Act of the AU entered into force on 26 March 2001. The text of the Act is available at www.africa-union.org ('Official Documents'). The OAU was established in 1963 and formally abolished in 2002. See further C. Heyns, E. Baimu, and M. Killander, 'The African Union', (2002) *German Yearbook of International Law* 252; C. Parker and D. Rukare, 'The New African Union and its Constitutive Act', (2002) 96 AJIL 365; and N. Udombana, 'The Institutional Structure of the African Union: A Legal Analysis', (2002) 33 *California Western Law International Law Journal* 69.
16. Naldi and Magliveras (1996), *supra* note 2, at 944; P. Amoah, 'The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights', (1992) 86 *American Journal of International and Comparative Law* 226, at 237; R. D'Sa, 'The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Actions', (1987) *Australian Yearbook of International Law* 101, at 26; U. Umozuriki, 'The African Charter of Human and Peoples' Rights', (1983) 78 AJIL 902, at 909; and Ph. Kunig, 'The Protection of Human Rights by International Law in Africa', (1982) *German Yearbook of International Law* 138, at 144.
17. International Commission of Jurists, *Human and Peoples' Rights in Africa and the African Charter – Report of a Conference* (1985), at 27 (referring to one of the 'founding fathers' of the Charter, K. M'Baye).

in cases involving human rights violations, exclude judicial settlement. Amicable forms of dispute settlement have mainly been developed in horizontal conflicts between individuals, groups, states, or other actors of equal rank or power. They presuppose, and only work efficiently in cases of, a certain equality of parties,[18] which is often absent in human rights abuse disputes. As elsewhere in the modern world, human rights conflicts in Africa of the 20th and 21st centuries are as a rule vertical conflicts between 'strong' states and 'weak' individuals, that cannot be adequately resolved on the basis of dialogue, good faith, or forgiveness. Especially where gross violations are involved, the possibility of obtaining a legal condemnation or getting compensation should exist.[19] Also in the African vision, law and justice require in such cases that as well as amicable dispute settlement there is access to judicial settlement procedures.[20] In other words, reference to specific or typical African norms could have supported the choice for a dual system, comparable with the former European system[21] under which a court procedure must be preceded by a procedure before the Commission, but they do not explain the choice not to establish a court at all.

The real objection to a human rights court was much more practical in nature: in the early 1980s Africa's leaders were simply still not willing to subject themselves to a 'supranational' court.[22] One could possibly have opted for a court without compulsory jurisdiction that would only be able to handle cases if the state involved had accepted the court's jurisdiction.[23] The political situation, however, was such that African leaders could even reject such a handicapped court. The majority of Africa's leaders lacked democratic legitimization and were accused of self-enrichment, corruption, and serious human rights violations, but nothing or nobody seemed able or willing to hold them to account. Internally, human rights activists and organizations were, often brutally, suppressed. External pressure was minimal. The OAU was in fact not much more than a fraternity of political leaders[24] governed by the golden rule of non-interference in each other's internal affairs. The two rival superpowers, for competing ideological reasons, turned a blind eye to the atrocities committed by many of Africa's leaders.[25] In brief, public opinion and political pressure were still too weak to enforce the establishment of a court.

2.2. The role of the African Commission

Since the late 1980s or early 1990s, however, the tide turned in favour of a court. With the end of the Cold War Africa's leaders lost the political cover of the superpowers. The 'new world order' provided fruitful ground for the development of notions

18. R. Murray, *The African Commission on Human and Peoples' Rights and International Law* (2000), at 177–8.
19. Udombana, *supra* note 2.
20. More generally, the two methods are not to be regarded as alternative but rather as complementary forms of dispute settlement. See Murray, *supra* note 18.
21. I.e., the European system as it existed prior to the entry into force of Protocol 11 in 1998.
22. Kunig, *supra* note 16, at 716, and Nmehielle, *supra* note 1, at 38–9.
23. Naldi and Magliveras (1996), *supra* note 2, at 944–5.
24. Cf. Udombana, *supra* note 15, at 72.
25. Cf. N. Busia, 'The New World Order and its Implications for Human Rights and Democracy in Africa – A Cortical Appraisal', (1993) *Proceedings of the American Society of International Law* 133.

such as democracy, transparency, good governance, and respect for and protection of human rights. These developments, as well as the gross and massive human rights violations in countries such as Sudan, Angola, and Rwanda, strengthened the call for an effectively functioning system of human rights protection. Human rights organizations, academics, and other 'watchers' began to follow the work of the African Commission, set up in 1987, more intensively. Initially it was recognized that the Commission should be given time to prove itself, but quite soon it became clear that the Commission was, and would continue to be, unable to protect human rights. The Commission was intended, and indeed has turned out, to be a 'paper tiger'.[26]

The Commission lacks effective powers. It cannot legally condemn states for human rights violations, or compel them to pay damages. The Commission can only receive complaints ('communications') from states parties[27] and individuals or non-governmental organizations (NGOs),[28] study these and send to the OAU/AU Assembly a report containing the facts, its findings, and recommendations. The Assembly has only the power of publication. Furthermore, the Commission has a structural shortage of financial means and thus staff, as a result of which it can only perform some of its tasks. Moreover, it appears that victims of human rights violations often do not find their way to the Commission. The Commission and its work are, even among lawyers, often wholly unknown, and because of the requirements laid down in the Charter[29] it has been forced to declare more than half of the complaints or communications inadmissible.[30] The Commission and its members have also been severely criticized. Some commissioners hold or have held government positions, which would seem to be incompatible with membership of the independent and impartial organ that the Commission ought to be.[31] Perhaps also for this reason the Commission was not known, especially in the early years, as a powerful organ that was able and willing to interpret progressively the rights enshrined in the Charter.[32] In all fairness, however, it must be noted that in recent years the Commission's functioning has improved. For example, it has interpreted the relevant provisions of the Charter in such a way as to provide for a right to submit individual complaints, has often ignored confidentiality provisions, and has been willing to interpret the so-called 'claw-back clauses' restrictively.[33]

26. Udombana, *supra* note 2, at 47, and A. Anthony, 'Beyond the Paper Tiger: The Challenge of Human Rights in Africa', (1997) 32 *Texas International Law Journal* 511.
27. Charter, *supra* note 1, Arts. 47–54.
28. Ibid., Arts. 55–59. See further C. Odinkalu and C. Christensen, 'The African Commission on Human and Peoples' Rights: The Development of its Non-state Communication Procedures', (1998) 20 *Human Rights Quarterly* 235.
29. Charter *supra* note 1, Art. 56. It concerns requirements such as indicating the names of authors (even if anonymity is requested), the use of respectful language, and exhaustion of local remedies.
30. Udombana, *supra* note 2, at 70.
31. E.g., the positions of attorney general, minister of justice or internal affairs, and ambassador. Moreover, a number of commissioners have occupied government posts in notorious dictatorial regimes, which may imply that they themselves are accountable for human rights violations. Udombana, *supra* note 2, at 71.
32. Ankumah, *supra* note 3, at 196.
33. For discussion of these points see the relevant parts in Ouguergouz, *supra* note 1.

2.3. The establishment of the Court

About five years after the establishment of the Commission it was widely recognized that measures had to be taken to improve the African human rights system. Various options were available: the Commission could be strengthened, complemented, or replaced by a court. The first option has remained a theoretical one. Proposals made by the Commission were never seriously discussed. The call for a court, from NGOs in particular, was simply too loud. The third option has also never been a serious one. A court is not the appropriate organ to promote human rights by conducting studies or organizing conferences, and the Inter-American and European systems had demonstrated that commissions could play a particularly useful role in human rights protection. From the beginning the second option – a dual system – was preferred. NGOs and also the ICJ in particular, led by Secretary-General Adama Dieng, took the initiative and urged African governments to work on a Protocol to the African Charter on the establishment of a court that would support and reinforce the Commission's protective mandate. In 1994 the OAU Assembly gave in and adopted a resolution, which called upon the organization's secretary-general to convene a meeting during which government experts, together with the African Commission, would consider how the Commission could be made more effective and the possibilities of establishing a human rights court.[34] In the following years three meetings were organized, in Cape Town (South Africa, September 1995), Nouakchott (Mauritania, April 1997) and Addis Ababa (Ethiopia, December 1997), which ultimately led to the approval and signing of the Protocol by 30 states during the 34th session of the OAU Assembly held in June 1998 in Ouagadougou (Burkina Faso).[35]

Throughout the negotiation process NGOs, under the co-ordinating leadership of the ICJ, exercised great influence.[36] The first meeting of government experts in Cape Town was preceded by an NGO workshop during which a draft protocol was agreed on which subsequently constituted the basis for the negotiations and debates in the meeting of government experts. This pattern continued throughout the whole negotiation process, enabling the NGOs to set the framework of the protocol and to define the contours of the discussions in the government experts' meetings. The NGOs placed the government representatives in a position in which they could no longer block the adoption of the protocol. States expressed their objections by a lack of interest and non-participation in the negotiation process,[37] which only increased, especially in the early stages, the dominance of the NGOs. Indeed, it is no exaggeration to state that the Protocol is above all the product of the NGOs' work, even though, as we shall see, they have been forced to accept some significant compromises.

Article 34(3) states that the Protocol shall enter into force 30 days after 15 instruments of ratification have been deposited. Initially the ratification process went

34. AHG/Res 230 (XXX) of the OAU Assembly of Heads of State and Government, adopted in June 1994 in Tunis, Tunisia.
35. International Commission of Jurists, 'African States Establish Supranational Human Rights Court', Press Release, Geneva, 12 June 1998.
36. For an overview of the negotiation process and the specific role played by NGOs, see, e.g., Harrington, *supra* note 2, at 308–15.
37. Ibid., at 315.

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rather slowly. In October 1998 Senegal ratified the Protocol, but by the end of 2002 only five other states had followed this example. In the course of 2003, however, the process gained momentum and after the 15th ratification by the Comoros on 26 December 2003 the Protocol was able to enter into force on 25 January 2004.[38] So far 19 African states[39] have ratified the Protocol.

3. Contentious jurisdiction

The answer to the question of whether, or to what extent, the Protocol will strengthen the African human rights protection mechanism largely depends on the jurisdiction it confers upon the Court. The Court possesses jurisdiction in cases and disputes concerning the interpretation and application of the Charter, the Protocol, and any other relevant human rights instruments ratified by the states concerned (Article 3(1)). Cases can be submitted by the Commission, by states parties involved in procedures before the Commission, by states parties whose citizens are victims of human rights violations, by African governmental organizations (Article 5(1)), by NGOs, and by individuals (Article 5(3)).

3.1. Scope *ratione materiae*

The material scope of the contentious jurisdiction is remarkably broad. The Court can apply not only the Charter and the Protocol, but also any other relevant human rights instrument.[40] Where the African Commission[41] and the European[42] and Inter-American[43] courts can only use other human rights instruments as a source of interpretation in applying the treaty by which they have been established, the African Court is empowered legally to condemn states for violations of other universal,[44] regional,[45] or sub-regional[46] treaties they have ratified.

Most commentators have welcomed this power of the Court,[47] and refer to the possibility for, or the right of, individuals to invoke those treaty provisions that are most favourable to them. Other commentators are more critical, and emphasize

38. African Union, Press Release No 121/2003, available at www.african-union.org (News and Events – Press Releases, December 2003).
39. See further www.africa-union.org/Official_Documents/Treaties (last visited 15 Oct. 2004). These are Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Gabon, Gambia, Libya, Lesotho, Mali, Mozambique, Mauritius, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo, and Uganda.
40. See also Art. 7 ('Sources of Law'), which provides that the Court shall apply provisions of the Charter and any other relevant human rights instrument ratified by the states concerned.
41. Charter, *supra* note 1, Art. 45(2) *juncto* Arts. 60 and 61.
42. European Convention on Human Rights, Arts. 32–34.
43. American Convention on Human Rights, Art. 62(1).
44. E.g., the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social, and Cultural Rights.
45. E.g., the 1990 African Charter on the Rights and Welfare of the Child.
46. Most probably, this does not only concern specific human rights treaties but also economic integration treaties, such as the 1975 Treaty establishing the Economic Community of West African States (ECOWAS), which (may) have human rights aspects. E. Quasigah, 'The African Court of Human Rights: Prospects, in Comparison with the European Court of Human Rights and the Inter-American Court of Human Rights', in African Society of International and Comparative Law, *Proceedings of the Tenth Annual Conference, held in Addis Ababa 3–5 August 1998* (1998), at 61–2.
47. See, e.g., Naldi and Magliveras (1996), *supra* note 2, at 435; Mutua, *supra* note 2, at 354; Udombana, *supra* note 2, at 90 and R. W. Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights', (2002) 2 *African Human Rights Law Journal* 223, at 227–8.

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that Article 3(1) refers only to other *relevant* human rights instruments. In their view, only treaties that explicitly confer jurisdiction on the Court would or should be regarded as relevant for the purposes of Article 3(1).[48] In support of this restrictive reading,[49] it is argued that the application of treaties other than the Charter would infringe the jurisdiction of other human rights organs and could possibly lead to inconsistent interpretations and applications of those other treaties. It is submitted that such a fear is exaggerated. Differences in interpretations will occur whenever various organs apply the same instruments, and research demonstrates that the proliferation of international oversight organs in the last decades has not led to 'jurisprudential chaos'.[50] One may have some confidence in the future judges of the Court, who must be competent and experienced in the field of human rights,[51] and assume that they will be wise enough to prevent such 'jurisprudential chaos'.

The suggested restrictive reading of Article 3(1) would further be justified by the fact that African states have ratified other treaties under the assumption that the rights guaranteed therein would not be legally enforceable in court.[52] This argument is not persuasive either. By ratifying the Protocol African states have knowingly and willingly committed themselves to Article 3(1), and the *travaux préparatoires* leave no doubt that this provision was intended to confer on the Court the power to apply treaties other than the Charter and Protocol.[53] It is correct that the broad substantive scope of Article 3(1) may deter African states from ratifying other treaties in the future,[54] but this political argument does not compel the legal conclusion that the Court lacks jurisdiction over other treaties.

3.2. Scope *ratione personae*

The practical significance of the broad material scope of the Court's contentious jurisdiction largely depends on the personal scope of this jurisdiction. The right to

48. C. Heyns, 'The African Regional Human Rights System: In Need of Reform?', (2001) 1 *African Human Rights Law Journal* 155, at 166–8. Cf. also I. Österdahl, 'The Jurisdiction *Rationae Materiae* of the African Court of Human and Peoples' Rights: A Comparative Critique', (1998) 7 *Revue Africaine des Droits de l'Homme* 132, at 138–40.
49. So far there is no other treaty that confers jurisdiction upon the Court.
50. See, e.g., J. Charney, 'Is International Law Threatened by Multiple International Tribunals?', (1998) 271 *Recueil des cours* 101. Compare the following observations of the Inter-American Human Rights Court: 'the possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is therefore, not unusual to find that on certain occasions courts reach conflicting or at the least different conclusions in interpreting the same rule of law.' I/A Court H.R., 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of 24 September 1982, Series A No. 1, para. 50.
51. Protocol, *supra* note 2, Art. 11.
52. Heyns, *supra* note 48, at 167–8.
53. The first Cape Town draft already indicated that the drafters intended to confer on the Court a broader competence than on the Commission. The draft defined the substantive scope as to cover 'any other applicable African human rights instrument'. During the Addis Ababa meeting this provision was amended so as to apply to 'any other relevant human rights instrument'. None of the represented states objected to this change. Report of the Third Government Legal Experts Meeting (enlarged to include diplomats) on the Establishment of an African Court on Human and Peoples' Rights, 8–11 Dec. 1997, Addis Ababa, Ethiopia, DOC OAU/LEG/EXP/AFC/HPR/RPT (III) Rev. 1, para. 16.
54. Heyns, *supra* note 48, at 167–8.

submit a case is first of all granted to states parties to the Protocol. This is unsurprising and of limited practical significance. In the light of the experiences of the African Commission and the European and Inter-American oversight organs, one may safely assume that African states will not make use of their right to initiate a case very often. The same, as may reasonably be expected, holds true for African governmental organizations, even though their inclusion in Article 5(1) is innovative and to be welcomed.

Of much greater importance is the right of individuals and NGOs to submit a contentious case. During the negotiations this was the most controversial issue. The NGOs logically favoured broad *locus standi* provisions. Victims of human rights violations, as ICJ Secretary-General Adama Dieng put it, should have 'recourse to judicial process on command'.[55] The NGOs recognized, however, that unlimited access to the Court for private parties would be unacceptable to the states. A compromise had to be reached. The first Cape Town draft contained provisions that prescribed that private parties, prior to addressing the Court, should first follow a procedure before the Commission.[56] Direct access to the Court would only be possible on exceptional grounds.[57] This proposal, however, was not acceptable to various states, among them most notably Nigeria and Sudan, that were not prepared to subject themselves to the future court's jurisdiction. On the insistence of these states a compromise was reached in Nouakchott and Addis Ababa: NGOs[58] and individuals can only access the Court if it has granted them permission to do so and the state party concerned has made a declaration accepting the competence of the Court.[59] If such a declaration has been given, individuals and NGOs do not have to show any other specific interest. More specifically, unlike the European Convention (Article 34), the Protocol does not require individuals to show that they themselves are victims of a human rights violation.

This compromise may have been necessary to get enough states on board,[60] but it is, especially from the perspective of 'recourse to judicial process on command', a disappointment.[61] So far, of the 19 states parties to the Protocol only one (Burkina Faso) has made a declaration accepting the Court's competence in cases initiated by private parties, and there are no indications that more states parties will follow the example of Burkina Faso in the near future.[62] More than 40 years after 'Lagos' it thus appears that African states are still not willing to subject themselves to a court that is accessible to victims of human rights violations.

55. Address of ICJ Secretary-General Adama Dieng at the opening of the Cape Town meeting, quoted in Nmehielle, *supra* note 1, at 250.
56. Charter, *supra* note 1, Art. 8.
57. Ibid., Art. 5.
58. The right is limited to NGOs with 'observer status' before the African Commission. The rationale of this condition, which is not imposed in the complaints procedure before the Commission itself, is not clear.
59. Protocol, *supra* note 2, Art. 5(3) *juncto* Art. 34(6).
60. Cf. I. Badawi El-Sheikh, 'Draft Protocol to the African Charter on Human and Peoples' Rights: Introductory Note', (1997) 10 *African Journal of International and Comparative Law* 943, at 947.
61. Cf. Mutua, *supra* note 2, at 355.
62. Of the first 15 states that ratified the Protocol only Burkina Faso was willing to accept jurisdiction in cases initiated by private parties. The author has no information on whether or not the four most recently acceding states have been willing to follow the Burkina example.

This does not imply that the Court has no added value for victims. Individuals and NGOs do have access to the Commission, and Article 5(1) of the Protocol grants the Commission the right to bring cases before the Court. This is a potentially very important power. On the request of parties or on its own initiative, the Commission can appeal to the Court in, in principle, all cases in which the state concerned does not comply with its recommendations.[63] The Court is not obliged to consider all such cases,[64] and it is of course not bound by the Commission's findings. However, the practice of the Commission shows that many of the cases before it are relatively easy in the sense that they involve clear human rights violations. The pressure on the Court to take up such 'easy' cases will be great, and often the Court may have no other choice than to confirm the Commission's conclusions. In such cases the right to access the Court enables the Commission to have its own non-binding recommendations transformed into legally binding convictions of the state party involved. For victims this implies that the Court, in spite of the absence of an own right to lodge a case, may constitute a forum for obtaining individual justice. The practical significance of this will largely depend on the Commission, and more specifically on the answer to the question of whether this organ will see itself as a defender of the rights and interests of individual victims of human rights violations or whether, like the previous European Commission, it will consider its task to be to act 'in the public interest'.[65]

4. Complementarity between Court and Commission

The above makes it clear that the Commission will continue to play a central role in the African human rights system. That was also the intention of the drafters of the Protocol. The Court has not been established to replace but to complement and reinforce the Commission. The Protocol, however, is vague on the relationship between the two organs. The drafters of the Protocol have left it to the Court and the Commission to work out the details about their mutual relationship and division of work.[66]

The future will reveal how Court and Commission will gear their activities to one another, but it is to be expected that cases, and particularly those initiated by private parties,[67] will first (have to) be handled by the Commission. In the short

63. Protocol, *supra* note 2, Art. 27.
64. Ibid., Art. 8.
65. R. Murray, 'A Comparison between the African and European Courts of Human Rights', (2002) 2 *African Human Rights Law Journal* 195, at 202.
66. Art. 8 of the Protocol provides that the Court shall lay down in its Rules of Procedure the conditions under which it shall consider cases brought before it. The Protocol merely requires the Court to consult, where appropriate, the Commission and to bear in mind the complementarity between the two organs. Protocol, *supra* note 2, Art. 33.
67. Art. 5 of the Protocol does not make it clear whether states parties and African organizations can directly address the Court or whether they first have to go to the Commission. During the negotiations there was a preference for a system under which it was required to go to the Commission first. In the end, however, the various parties decided to have this point worked out by the Court and the Commission themselves. The Court seems to have a choice. The text of Art. 5(1) leaves room for direct access to the Court, but the notion of complementarity referred to in Art. 8 can possibly be interpreted to imply that states parties and government organizations will first have to go to the Commission.

term, this will be the case anyway, since the number of states that have accepted the Court's competence in cases submitted by individuals and NGOs is still very limited. A possible increase in the number of declarations accepting the Court's jurisdiction will not necessarily change the situation. The Court can confer on itself mandatory jurisdiction, but there are good reasons to assume that it will not do so.[68] First, the drafting history of the Protocol suggests otherwise.[69] As said earlier, during the negotiations it was assumed that access to the Court would be conditional on a prior procedure before the Commission. The relevant provisions of the Cape Town and Nouackchott drafts have ultimately been deleted, but this did not imply a principled choice to abandon the condition of a prior Commission procedure.[70] The drafters held to this condition and have merely decided to have the details concerning the passing of cases between Court and Commission worked out by these organs.[71] Second, practical considerations relating to the case- and workload plead for a system under which the Commission needs to be addressed first. An increase in the number of declarations on acceptance of the Court's jurisdiction is likely to lead to an increase in the number of cases brought directly before the Court. The experiences of, for example, the UN Human Rights Committee show that acceptance of mandatory jurisdiction could trigger a flood of cases and considerable delay in procedures.[72] Third, the notion of complementarity, prescribed by the Protocol, would seem to require a prior Commission procedure. Vague as it may be, the notion of complementarity does make it clear that the Commission will continue to play an important role in the future African human rights protection system. If the Court were to confer on itself mandatory jurisdiction, and thus offer individuals and NGOs the choice of addressing either the Court or the Commission, the role of the latter organ may be reduced to a marginal one. After all, it is not unrealistic to assume that most individuals and NGOs, with a view to obtaining legal convictions or reparation, would prefer the Court to the Commission.

It may thus be expected that the Court, in principle, will transfer cases submitted by private parties to the Commission and only consider certain cases such as those involving gross and massive human rights violations or those raising fundamental questions having implications for cases other than the one in which they arise. As a result, the Court, in relation to the Commission, will in most cases fulfil the role of an appeal organ.[73] The Court will have to decide for itself whether or not in such appeal cases it will accept mandatory jurisdiction. For the status of, and public confidence in, the Court and the entire African human rights system it would seem desirable that the Court will take up all cases in which victims disagree with the findings of the Commission, wish to have the state concerned condemned by the Court, want to obtain a condemnation of reparation, or would like to have an

68. The Court has the power not to consider a case (Art. 5(3)) and to refer it to the Commission (Art. 6(3)).
69. I. Badawi El-Sheikh, 'The Future Relationship between the African Court and the African Commission', (2002) 2 *African Human Rights Law Journal* 252, at 254.
70. See Ouguergouz, *supra* note 1, at 719.
71. Cf. Harrington, *supra* note 2, at 317.
72. Mutua, *supra* note 12, at 32–3.
73. Cf. Harrington, *supra* note 2, at 331.

answer to a question on a fundamental point of law.[74] However, given the possible workload of the Court, one cannot exclude the possibility that the Court will opt for a more selective admissibility policy. Much will depend on the vision of the future judges on the role or function of the Court.[75] If they view the Court as a forum where individuals should be able to obtain justice, compulsory jurisdiction would seem logical. It would be different, however, if the judges were to see the Court primarily as a proactive organ entrusted with the task of developing an African human rights jurisprudence that will guide and help the Commission and national judges in dispute settlement and, more generally, in the task of contributing to a legal and political culture in which human rights are respected and observed.[76]

5. Advisory jurisdiction

By virtue of Article 4(1) of the Protocol, the Court has the power to give legal opinions. During the negotiations this competence was fairly uncontroversial. The participating states had little or no objection to legally non-binding opinions, with the result that the provisions proposed by the NGOs favouring a strong court could be agreed upon fairly quickly. As a result, the newly created African Court possesses an advisory jurisdiction that exceeds that of any other international human rights organ.

The material scope of the advisory jurisdiction is broad in the sense that the Court can express itself not only on the Charter but also on any other human rights instrument. The only restriction is that the subject matter of the opinion is not related to a matter being examined by the Commission. This condition, which is meant to protect the protective mandate of the Commission, implies[77] that those entitled to request a legal opinion will have to address either the Court or the Commission.[78]

A request for an opinion can be submitted by the AU, one of the AU organs, an AU member state,[79] or an African organization recognized by the AU.[80] On this

74. This does not necessarily imply that individuals have an unlimited right to appeal to the Court. The Court can also engage in fact-finding, but because of the possible workload it could decide to limit itself to cases in which appeals are based on legal grounds. Cf. Murray, *supra* note 65, at 198–9.
75. Dispute settlement bodies can fulfil various roles. The first is to provide individual justice. This concerns a retroactive function. The violator is retroactively condemned and the victims may afterwards, where necessary and possible, receive some kind of reparation. The second function is pro-active and involves the deterrent effect that a judgment in a given case may have on future human rights violators. The third role concerns the interpretation and clarification of human rights instruments. See H. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?', in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (1999).
76. Cf. Mutua, *supra* note 12, at 33.
77. Ouguergouz, *supra* note 1, at 751.
78. The Commission also possesses interpretative powers. See Charter, *supra* note 1, Art. 45(3).
79. Unlike Art. 5 on contentious jurisdiction, which only allows states parties to the Protocol to initiate a case against another state party, Art. 4 does not impose the condition that a state must have ratified the Protocol. The difference makes sense. Art. 5 underlies the notion that a state that is unwilling to accept the Court's jurisdiction in cases that might be brought against it should also not have the right to initiate a case against another state. That rationale does not extend to Art. 4. The purpose of advisory proceedings is to enable states to obtain a judicial interpretation on human rights matters, which might also assist other states in fulfilling their human rights obligations. If the Protocol had denied a state the right to request an advisory opinion on

point the Protocol is more generous than the European Convention, which only entitles the Council of Europe's Committee of Ministers to ask for an opinion,[81] and the American Convention, which allows the OAS member states and, within their spheres of competence, the OAS organs to do so. The practical meaning of the differences compared with the Inter-American Court, which had so far possessed the broadest advisory jurisdiction,[82] would seem, however, to be limited. This holds true, for example, for the fact that the AU itself can request an advisory opinion. As such this is innovative in the sense that neither the OAS nor, to the knowledge of this author, any other international organization enjoys a comparable right. However, the added value of the inclusion of the AU in Article 4 would seem to be minimal, if not zero, because the AU, by definition, will have to be represented by one of its organs, which in their own right enjoy the right to seek an advisory opinion from the Court. The drafting history of the Protocol nowhere reveals why the AU has been granted standing and one wonders whether the issue was well thought through. Further, the fact that the Protocol, unlike the American Convention, does not explicitly require that AU organs must act within their sphere of competence is unlikely to have much significance. Apart from the fact that AU organs will only rarely, if ever, seek a request on subject matter falling outside their field of competence, it is likely that the Court will apply this condition.[83] If it did not do so, it would leave it up to the AU organs, and ultimately up to the Court of Justice of the AU,[84] to determine whether a given AU organ can request an advice. It is, however, a rule of international customary law that international tribunals possess the *compétence de la compétence*: they themselves are empowered to decide whether or not a given matter falls within their jurisdiction.[85] Finally, one may doubt whether all AU organs can actually request an opinion from the Court. This holds true for the Court itself. By virtue of Article 5(2) of the Constitutive Act of the AU, the Court is an AU organ and, taken literally, this would imply that the Court, on its own motion, might identify issues for interpretation and decide to issue an opinion. The background to and text of Article 4(1) make it clear that advisory proceedings *motu proprio* were not intended and, indeed, are not provided for. Comparable doubts arise

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the sole ground that it has not ratified the Protocol, it would have done a disservice to other states, including those that have ratified the Protocol.

80. Art. 4(1) indicates that such a request can be made by the OAU, OAU member states, OAU organs, and African organizations recognized by the OAU. Because the OAU has now been replaced by the AU, the references in Art. 4 (and throughout the entire Protocol) to the OAU, its member states, and its organs must now be read as references to the AU, AU member states, and AU organs.
81. ECHR, Art. 47.
82. See J. M. Pasqualucci, 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law', (2002) 38 *Stanford Journal of International Law* 241; and T. Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court', (1985) 79 AJIL 1.
83. Ouguergouz, *supra* note 1, at 752.
84. This argument would be much weaker if the African human rights court were to be merged with the AU Court of Justice. On the need for, and prospects of, such a merger see F. Viljoen and E. Baimu, 'Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice', (2004) 22 *Netherlands Human Rights Quarterly* 241; and N. J. Udombana, 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication', (2002) 28 *Brooklyn Journal of International Law* 811.
85. *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objections of 18 November, [1953] ICJ Rep. 111, paras. 119–120.

as regards the AU Committee of Permanent Representatives, which is entrusted to prepare and implement the work of the AU Executive Council.[86] This Committee is meant to be the equivalent of the Committee of Permanent Representatives of the European Union,[87] which suggests that the Committee does not occupy its own independent legal position within the AU institutional framework. If this is indeed so, the Committee probably does not have the right to initiate an advisory proceeding before the African human rights court.

The potentially most important difference from the American Convention[88] concerns the inclusion in Article 4(1) of African organizations recognized by the AU. The Protocol does not make it clear, however, whether these might also encompass NGOs. The fact that Article 4, unlike Article 5 on contentious jurisdiction, does not make a distinction between governmental and non-governmental organizations could be interpreted to mean that the latter do have the right to request a legal opinion.[89] It could also be argued, however, that because NGOs in principle have no direct access to the Court in contentious cases,[90] they (should) have no right to request an opinion, since this would enable them to initiate in a covert form a case against a member state that has not accepted the Court's jurisdiction in cases brought by private parties. A flexible solution may be expected: NGOs may request a legal opinion, but the Court may decline the request if it suspects or concludes that the action is in fact a contentious case against a state that has not accepted the Court's competence in such cases.[91]

The Protocol does not indicate whether the Court, like the Inter-American Court,[92] may give opinions on the compatibility of national legislation or practices with international human rights law and, if so, whether national judges, as organs of the state, may also request such advice.[93] This is a potentially significant point.[94] In the near future most victims will only be able to obtain a legal condemnation or reparation from national judicial organs. The possibility of these organs' obtaining clarification from the African court on the compatibility of national rules and measures could contribute to the objective application of human rights treaties and the development of universal human rights jurisprudence for the African continent. The text of the Protocol does not object to such opinions, which could play a role comparable to that of the preliminary rulings of the Court of Justice of the European Communities.[95] However, in the light of the resistance of African states to interference in their internal matters, it is far from certain whether the

86. Constitutive Act of the AU, Art. 21.
87. Treaty Establishing the European Community, Art. 207.
88. ACHR, Art. 64.
89. Ouguergouz, *supra* note 1, at 750, and Eno, *supra* note 47, at 232.
90. Eno, *supra* note 47, at 232.
91. The Court is not obliged to give an opinion ('may provide'), but one may expect that the Court will only refuse to do so if compelling reasons so require. Furthermore, Art. 4(2) states that the Court shall give reasons for its opinions, and it may be assumed that the same applies where the Court decides not to give an opinion.
92. See ACHR, Art. 64(2).
93. To be sure, the American Convention does not give this right to judges.
94. On the future relationship between the Court and national judiciaries and, more generally, national legal orders, see K. Hopkins, 'The Effect of the African Court on the Domestic Legal Orders of African States', (2002) 2 *African Human Rights Law Journal* 234.
95. EC Treaty, Art. 234.

Court will be willing to give opinions on the compatibility of domestic laws with international human rights law.[96]

6. Composition, proceedings, and judgments

The bulk of the 35 articles of the Protocol deals with the composition of and the proceedings before the Court. The Court is composed of 11 judges, each of whom is a national of one of the AU member states[97] and has recognized practical, judicial, or academic competence and experience in the field of human and peoples' rights. They are elected in their individual capacity by the AU Assembly for a term of six years which can be renewed only once. The main regions[98] and legal systems[99] of Africa as well as both sexes[100] shall be (adequately) represented.

The drafters have sought to repair a number of shortcomings of the Commission. This first of all involves the independence and impartiality of the judges, which, as noted earlier, has been questioned and criticized in the case of members of the Commission.[101] For this purpose the Protocol contains a number of classic provisions which prescribe that the judges, after their election, shall make a solemn declaration to discharge their duties impartially and faithfully,[102] that they shall enjoy diplomatic immunities,[103] that they shall not hear any case in which they have previously taken part as counsel or in another capacity,[104] and that they shall not be held liable for any decision or opinion issued in the exercise of their functions.[105] In addition, the Protocol states that the Rules of Procedure will specify what activities shall be considered incompatible with the independence and impartiality of the position of judge[106] and that a judge who is a national of a state which is a party to a case before the Court shall not hear that case.[107] On this last point, the Court differs from other international oversight organs for which the rule usually applies that parties in a procedure are entitled to have an own national as a judge in order to ensure that their arguments are evaluated adequately. During the negotiations it appeared that there was much resistance to the option of having ad hoc judges, who, it was feared, would primarily be guided or motivated by national interests.[108]

96. Naldi and Magliveras (1998), *supra* note 2, at 440.
97. Protocol, *supra* note 2, Art. 11.
98. Ibid., Art. 14(2).
99. Ibid.
100. Ibid., Art. 14(3).
101. See *supra* note 31.
102. Protocol, *supra* note 2, Art. 16.
103. Ibid., Art. 17(3).
104. Ibid., Art. 17(2).
105. Ibid., Art. 17(4).
106. Ibid., Art. 18. One of the main points of discussion during the negotiations was whether the judges would have to work on a full-time or part-time basis. Advocates of full-time judges argued that this was necessary to avoid judges, like some members of the Commission, engaging in other activities that might be incompatible with the post of judge. Opponents referred to the financial implications and the fact that the workload of the Court would, at least in the near future, probably be rather minimal. The option eventually chosen was that of part-time judges (with the exception of the president – ibid., Art. 21(2)) and the inclusion of Art. 18.
107. Ibid., Art. 22.
108. Nmehielle, *supra* note 1, at 290–1.

A second difference between the Court and the Commission involves the proceedings. The Protocol provides that the Court shall conduct its proceedings in public, even though the Court may decide to hold proceedings in camera.[109] In comparison with the Commission, whose proceedings often take place behind closed doors, this implies a significant improvement that may increase the transparency of the proceedings and public control over the functioning of the Court. Furthermore, the Protocol provides that parties to a case are entitled to be represented by a legal representative of their choice and it provides for free legal representation where the 'interests of justice' so require. This is meant to ensure that proceedings before the Court will not, as often has been the case with the Commission, be unnecessarily delayed or complicated by ill-defined complaints by legally untrained persons.

There is no doubt that the main difference between the Court and the Commission is that the Court holds the power legally to condemn states parties for human rights violations. States parties must comply with the judgment of the Court in any case to which they are parties and must guarantee its execution.[110] In addition, the Court can make appropriate orders to remedy violations, including the payment of fair compensation or reparation,[111] and, in cases of extreme gravity and urgency, it can adopt provisional measures to avoid irreparable harm to persons.[112] Quite remarkable is the provision that prescribes that the Court shall render its judgment within 90 days of having completed its deliberations.[113] As such this rule is to be welcomed since it will ensure that parties, as has quite often been the case with the Commission, will not have to wait an unnecessarily long time for the decision in their case. The period of 90 days would seem to be quite short, however, given the fact that the judges, at least in the first years, will work on a part-time basis and that the Court will probably only meet for a limited number of weeks a year. The danger exists that, especially in more complex cases, the 90-day requirement will not be met. The Court's decision is reached by a majority of votes,[114] and each of the judges shall have the option of delivering a concurring or dissenting opinion.[115] The judgments of the Court shall be reasoned[116] and be read in open court.[117] They are final[118] and shall be notified to the parties, the African Commission, the AU member states,[119] and the Executive Council of the AU, which, on behalf of the AU Assembly, shall monitor its execution.[120] It is important to point out here that the AU Constitutive Act confers on the AU Assembly the power to impose economic

109. Protocol, *supra* note 2 Art. 10(1).
110. Ibid., Art. 30.
111. Ibid., Art. 27(1).
112. Ibid., Art. 27(2).
113. Ibid., Art. 28.
114. Ibid., Art. 28(2).
115. Ibid., Art. 28(7).
116. Ibid., Art. 28(6).
117. Ibid., Art. 28(5).
118. Ibid., Art. 28(2).
119. Ibid., Art. 29(1).
120. Ibid., Art. 29(2).

and political sanctions on states parties that fail to comply with decisions of AU organs,[121] including the Court.[122]

7. Conclusion

The question of whether the Court will be able to live up to expectations cannot yet be answered univocally. First, its success will depend on a number of still uncertain factors, such as the financial means that will be put at the Court's disposal,[123] the communications and transport facilities available in the country that will be the seat of the Court,[124] the willingness of the future judges to give maximum effect to human and peoples' rights, and the number of states that will be willing to ratify the Protocol and to accept the Court's jurisdiction in cases initiated by private parties. Second, the answer to the question stated above depends on what one expects from the Court. If one focuses exclusively on the Court and starts from the notion of 'access to judicial recourse on command' for victims of human rights violations, then there is little reason for optimism. In the near future the Court will not as yet be accessible to private parties, and one could regard the Protocol as a conservative document[125] that once again shows that in the African system it is the interests of states, and not those of individuals, that prevail. If, however, one looks at the entire African human rights system, one can be much more positive. The Protocol enables the Court to work on and to develop an African human rights jurisprudence that can help and guide the Commission and national judiciaries in settling disputes, and it provides for the possibility that the legally non-binding decisions of the Commission can be transformed into legally binding convictions by the Court. Indeed, the establishment of the Court implies a significant strengthening of the Commission and this is in itself sufficient reason warmly to welcome the entry into force of the Protocol. As the Inter-American and the former European systems have demonstrated, a court that is not directly accessible to victims of human rights violations can make a significant contribution to the protection of human rights, even though this makes no difference to the wish that a much larger number of African states will ratify the Protocol and accept the jurisdiction of the Court in cases initiated by private parties.

121. Constitutive Act of the AU, Art. 23(2).
122. Ibid., Art. 5(2).
123. In 1998 the OAU Council of Ministers granted a provisional budget of $753,518 to the Court for its immediate operation. Ouguergouz, *supra* note 1, at 708.
124. Cf. Report of the Experts Meeting on the African Court on Human and Peoples' Rights, Ouagadougou (Burkina Faso), 7–9 December 1998, OAU DOC/OS (XXV/93), Annex, Part B(iii).
125. Harrington, *supra* note 2, at 329.